

Court of Appeals, State of Michigan

ORDER

Estate of Conde Gonzalez v St John Hosp & Med Center

Docket No. 272093

LC No. 05-506716-NH

David H. Sawyer
Presiding Judge

E. Thomas Fitzgerald

Pat M. Donofrio
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 6, 2007, is hereby VACATED. A new opinion will be issued.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 14 2007

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

BONNIE JEAN GONZALEZ, Personal
Representative of the Estate of CONDE
GONZALEZ,

UNPUBLISHED
February 6, 2007

Plaintiff-Appellant,

v

No. 272093
Wayne Circuit Court
LC No. 05-506716-NH

ST. JOHN HOSPITAL & MEDICAL CENTER,

Defendant-Appellee,

and

NORTHEAST SURGICAL ASSOCIATES, P.C.,
PETER D. KOWYNIA, M.D., and
CHRISTOPHER N. VASHI, M.D.,

Defendants.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant St. John Hospital & Medical Center in this medical malpractice action. Because plaintiff failed to provide a statutorily qualified expert, the action could not continue and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent, Conde Gonzalez, was admitted to St. John for treatment of complications resulting from surgery. Decedent was treated by defendants Christopher N. Vashi, M.D., then a third-year surgical resident, and Peter D. Kowynia, M.D., decedent's surgeon. Decedent began to bleed profusely from a drainage catheter. A leak was discovered in decedent's left iliac artery, and despite surgical intervention to repair the leak, decedent died. Plaintiff filed suit alleging that defendants committed medical malpractice in their diagnosis and treatment of decedent. Plaintiff submitted an affidavit of merit from Mark Gordon, M.D., who is a board certified general surgeon and who stated that Vashi violated the applicable standard of care in his treatment of decedent.

Defendants St. John, Kowynia, and Northeast Surgical Associates, P.C., Kowynia's professional corporation, moved for summary disposition pursuant to MCR 2.116(C)(7) and/or (10).¹ Defendants argued, inter alia, that because plaintiff's expert was a specialist and Vashi was a general practitioner, the expert was not qualified to offer testimony against Vashi under MCL 600.2169(1)(c). The trial court granted summary disposition in favor of St. John. The trial court acknowledged that case law held that Vashi was a general practitioner rather than a specialist, and that under MCL 600.2169, Gordon, a specialist, was not qualified to testify against Vashi.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Similarly, statutory interpretation is a question of law that we review de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). We review a trial court's ruling regarding the qualification of a proposed expert witness to testify for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). If the defendant is a general practitioner, the plaintiff must prove that the defendant "failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community" MCL 600.2912a(1)(a).

Expert testimony is required to establish the applicable standard of care and to demonstrate that the defendant breached the standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). In order to proceed against a hospital on a theory of vicarious liability, a plaintiff must offer expert testimony to establish specific breaches of the standards of care applicable to the individuals involved in the plaintiff's care and treatment. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 22; 651 NW2d 356 (2002). Pursuant to MCL 600.2169(1), in order to testify as to the standard of practice applicable in a particular case, the expert's qualifications must match those of the defendant. If the defendant is a specialist, the expert witness must, at the time of the occurrence that forms the basis of the action, specialize in the same specialty, and subspecialty if applicable, as the defendant. MCL 600.2169(1)(a); *Woodard*, *supra* at 578-579. If the defendant is a general practitioner, the expert witness, "during the year immediately preceding the date of the occurrence that is the basis for the claim or action," must have devoted a majority of his professional time to active practice as a general practitioner or to the teaching of general practice. MCL 600.2169(1)(c).

Plaintiff argues that the trial court erred by granting summary disposition in favor of St. John. Plaintiff notes that a specialist is a physician who limits his practice to a specific branch of

¹ Vashi had been dismissed as a defendant prior to the filing of the motion for summary disposition and, Kowynia and Northeast Surgical associates were dismissed from the case before the trial court ruled in favor of St. John.

medicine or surgery, and in particular is one who, by virtue of advanced training, is certified as a specialist. A physician can be a specialist without being board certified as such. *Woodard, supra* at 561. Plaintiff asserts that at the time decedent died, Vashi was a resident receiving advanced training in general surgery; thus, Vashi should be considered a specialist in that field. Michigan law holds that a resident is a nonspecialist. They are held to the local community standard of care. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 138; 528 NW2d 170 (1995).

In order to hold St. John vicariously liable for Vashi's actions, plaintiff was required to establish a breach of the standard of care applicable to Vashi via expert testimony. *Cox, supra*; *Birmingham, supra*. Because Vashi was a general practitioner, plaintiff was required to produce an expert witness who, during the year immediately preceding the occurrence that forms the basis for the claim, devoted a majority of his professional time to active clinical practice as a general practitioner, or to the teaching of general practice. MCL 600.2169(1)(c). It is undisputed that plaintiff's proposed expert, Dr. Gordon, was not a general practitioner, but rather was a board certified general surgeon who, in the year prior to decedent's death, neither actively practiced as a general practitioner nor taught general practice. The trial court correctly recognized that, a proper application of MCL 600.2169(1)(c) precluded Gordon's testimony. The trial court did not abuse its discretion in barring Gordon's testimony, and did not err by granting summary disposition in favor of St. John.

Affirmed.

/s/ David H. Sawyer

/s/ Pat M. Donofrio